FILED
SUPREME COURT
STATE OF WASHINGTON
2/1/2022 2:21 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 100506-7
Court of Appeals No. 37574-9-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JUNGERS, CRAIG,
Petitioner.

SHORTENED ANSWER TO PETITION FOR REVIEW

KEVIN MCCRAE
Grant County Prosecuting Attorney

Rebekah M. Kaylor
WSBA# 53257
Chief Deputy Prosecuting Attorney
Attorneys for Respondent

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 754-2011

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I. ISSUES PERTAINING TO APPELLANT'S ISSUES PRESENTED FOR REVIEW

A. DID THE TRIAL COURT CORRECTLY EXERCISE ITS DISCRETION TO DENY MR. JUNGERS' EVE-OF-TRIAL SUBSTITUTION REQUEST WHEN HE PREVIOUSLY CONTINUED TRIAL MULTIPLE TIMES OVER OBJECTIONS BY THE STATE AND THE VICTIM, AND THE VICTIM WAS HAVING TO PUT PLANS TO ENTER THE MILITARY ON HOLD?

B. DID THE TRIAL COURT HAVE SUFFICIENT INFORMATION TO DETERMINE WITHOUT HOLDING AN IN-CAMERA HEARING THE NATURE OF MR. JUNGERS' CLAIMED CONFLICT WITH COUNSEL?

C. WHETHER MR. JUNGERS DEMONSTRATED THAT CLAIMED CONSTITUTIONAL ERROR IS MANIFEST?

D. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION WHEN IT DENIED MR. JUNGERS' REQUEST FOR A SSOSA?

II. STATEMENT OF THE CASE[1]

The State incorporates and relies upon the Statement of

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[1] The State adopts the Court of Appeals citation to the Record of Proceedings as "RP" other than sentencing which is referred to as "RP (Sentencing)." *State v. Jungers*, No 37574-9-III, 2021WL 4099249, slip op. at 4 n. 2 (Sept. 9, 2021) *amended on denial of reconsideration* (Dec. 2, 2021). The clerk's papers are referred to as CP __.

the Case from the State's response brief in this case at the Court of Appeals.

III. ARGUMENT FOR WHY REVIEW SHOULD BE DENIED

A. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION TO DENY MR. JUNGERS' EVE-OF-TRIAL SUBSTITUTION REQUEST WHEN HE PREVIOUSLY CONTINUED TRIAL MULTIPLE TIMES OVER OBJECTIONS BY THE STATE AND THE VICTIM, AND THE VICTIM WAS HAVING TO PUT PLANS TO ENTER THE MILITARY ON HOLD.

1. Standard of Review

Appellate courts review a trial court's decision to grant or deny a defendant's motion to substitute retained counsel for abuse of discretion and affirm that decision unless the denial was "so arbitrary as to violate due process." *State v. Hampton*, 184 Wn.2d 656, 663, 361 P.3d 734 (2015) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)).

> A trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." "A decision is based 'on untenable grounds' or made

> 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' and arrives at a decision 'outside the range of acceptable choices.'"

Id. at 670–71 (citations omitted).

2. Controlling legal principles

The right to counsel of their choice for criminal defendants who can afford private counsel is not absolute. *Id.* at 662–63 (citing *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)). This Court specifically discussed substitution of counsel requiring a continuance of trial in *Hampton*. *Id.* at 663.

A trial court has "wide latitude" to balance the right to counsel of choice "against the demands of its calendar." *Gonzalez-Lo*pez, 548 U.S. at 152. Because a defendant cannot "unduly delay the proceedings," courts should deny a belated

request to substitute retained counsel if it results in significant delay. *Aguirre*, 168 Wn.2d at 365; *State v. Early*, 70 Wn. App. 452, 457–58, 853 P.2d 964 (1993). The right to counsel of choice is violated only by "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

This Court held in *Hampton* that a trial court may consider all relevant information including eleven specific factors when weighing the right to choice of counsel "against the demands of its calendar and the public's interest in the prompt and efficient administration of justice." *Hampton*, 184 Wn.2d at 669. Motions to substitute retained counsel are highly fact dependent; not all factors are present in every case. *Id.* at 670. Courts do not need to evaluate every factor in every case nor apply a mechanistic test. *Id.*

3. *Application of* Hampton *factors to Mr. Jungers' eleventh-hour motion to substitute counsel after having continued the proceedings multiple times.*

In Mr. Jungers' case, the trial court properly balanced Mr. Jungers' right to counsel, with efficiently administering justice as required. *See Hampton*, 184 Wn.2d at 662. The Court of Appeals correctly found the trial court did not abuse its discretion in finding the *Hampton* factors did not support a continuing trial for three months after walking through the *Hampton* factors. *State v. Jungers*, No 37574-9-III, 2021WL 4099249, slip op. at 21–26 (Sept. 9, 2021) *amended on denial of reconsideration* (Dec. 2, 2021); *see* RP 135–39.

Significantly, one of the *Hampton* factors asks whether there is a rational basis for believing the defendant was seeking to change counsel primarily for the purpose of delay. *Hampton*, 184 Wn.2d at 670. The trial court astutely noted there was "some indication" of a rational reason to believe that Mr. Jungers' last-minute request to substitute counsel was motivated by a desire to delay proceedings. RP 138; *Hampton*, 184 Wn.2d at 670.

Throughout the intercepted call with H.N., Mr. Jungers said he was "scared shitless" about what might happen to him, especially about going to prison. CP 9–12. He told the SSOSA evaluation polygraph operator he feared his disclosures would increase his incarceration and "given his age, he would not do well in prison." CP 155. Judge Estudillo remarked on Mr. Jungers' "strong concerns about going to jail for the rest of his life" at the release conditions hearing. RP 10.

Mr. Steinmetz, either personally or through stand-in counsel, regularly reported ongoing settlement negotiations. RP 52–53, 64, 83, 102. During the substitution motion hearing, Mr. Steinmetz told the court he focused his efforts on crafting a resolution to effect his client's instructions to him to craft a resolution that would avoid prison. RP 123–24.

It is reasonable to assume Mr. Steinmetz and his predecessor advised Mr. Jungers of the trial risk posed by the intercepted and recorded confession. The record establishes Mr. Jungers and his attorney put all their energy—and faith—in the

availability of a SSOSA sentence in which Mr. Jungers would remain in the community. But Mr. Jungers' was incapable of accepting responsibility for his pedophilia, first evidenced when he recounted to H.N. his improbable tale of her seven-year-old sexual aggression. CP 10. He took no responsibility for his self-disclosed "ongoing pattern" of sexual exploitation of female juveniles. RP (Sentencing) 10. Ms. Crest initially concluded he was not an appropriate SSOSA candidate. She changed her opinion to "minimally appropriate" in her subsequent November 22 report. RP (Sentencing) 10.

By the first of January 2020, counsel was sure to have advised Mr. Jungers he could not guarantee a SSOSA, although chances at trial appeared even more dismal. Less than a week before trial, he stipulated to the admissibility of his intercepted confession. RP 109. He did not contest that he would change his plea the following week. RP 108. He confirmed his stipulations were knowing and voluntary. RP 109.

The reasonable conclusion is that Mr. Jungers panicked immediately after realizing the full significance of his CrR 3.5 stipulation. The specter of spending the remainder of his life in prison plagued him from the day he confessed to H.N. At the eleventh hour, he found a welcome reprieve from almost-certain incarceration in an attorney who could not be trial-ready for three months.

Furthermore, Mr. Jungers' complaints about counsel at the hearing on August 20, 2019, expressly excluded Mr. Steinmetz. RP 59. Mr. Jungers thought the two of them were making progress. RP 59. It appears Mr. Jungers and Mr. Steinmetz worked together toward the contemplated plea agreement in the days leading up to the CrR 3.5 hearing. Mr. Jungers confirmed to stand-in counsel and the court he fully understood his CrR 3.5 stipulation. RP 108–09. There is no evidence Mr. Steinmetz had any reason to believe that Mr. Jungers changed his mind about the negotiated settlement before terminating Mr. Steinmetz.

Although the trial court declined to place blame or find the motion "negligent," RP 138, this Court should conclude, that Mr. Jungers' panic when facing a lifetime behind bars led directly to the untimely substitution motion.

Ultimately, the court concluded unless Ms. Couture would agree to be prepared for trial in two weeks, the *Hampton* factors did not weigh in favor of substituting her for Mr. Steinmetz. RP 139. This Court should find that the trial court appropriately exercised its discretion after weighing the relevant factors. As such, neither Mr. Jungers' right to counsel nor due process was not violated.

4. *Mr. Jungers' arguments and self-serving misconstruing of facts do not hold up when reviewed against the record.*

a. The court affirming Mr. Jungers for speaking up about his alleged experience with Ms. Penner.

In addition, Mr. Jungers misconstrues the record regarding being "chastised" by the court. *See* Pet'r's Br. 13. On August 20, 2019 (not August 2020 as Mr. Jungers claims,

Petr's' Br. 13), the trial court was considering whether to grant Mr. Jungers' request for a fifth continuance in the case. RP 51, 56. Counsel offered information they thought relevant to the court regarding the attorney's need for additional time. RP 56. Mr. Jungers attempted to substantiate the attorney's argument for a continuance telling the court about his alleged struggle in communicating with the previous attorney, Elizabeth Mount Penner. RP 56–57. In response, the court started reviewing the history of the case. RP 57. In the middle of the verbal review, Mr. Jungers asked the court if he may say something. RP 57. The judge responded by directing Mr. Jungers to let his attorney know and then the attorney could let the court know. RP 57. The court then continued its review of the case. RP 57. When the court was finished reviewing the case history, it turned back to Mr. Jungers asking if there was something he needed to say. RP 57.

Mr. Jungers then alleged that he had difficulty in contacting the previous attorney. RP 58. He did not say

anything about Mr. Steinmetz, even without Mr. Steinmetz present. RP 58–59. The court then stated, "Thank you. Normally I don't hear from the Defendant, but it was actually helpful what you told me because I need to make sure that you have a fair trial." RP 59.

Clearly, the court was attempting to review the record and asked Mr. Jungers to communicate with counsel when Mr. Jungers interrupted the court's review. The court circled back to Mr. Jungers and asked him what he wanted to say and then affirmed Mr. Jungers for sharing. Far from dissuading Mr. Jungers, the court encouraged Mr. Jungers to express his concerns.

b. Mr. Jungers' reliance on *United States v. Santos* and *In re Fowler* are inapposite.

Mr. Jungers attempts to undermine the Court of Appeals by comparing his case to that of *United States v. Santos* from the Seventh Circuit. Pet'r's Br. 14 (citing 201 F.3d 953, 958–59 (2000)). In *Santos*, the defendant had funds to hire a private

attorney. *Santos*, 201 F.3d at 957. When the trial court was setting the case schedule at the arraignment in February and the defense attorney was unavailable until June, the trial court proceeded to schedule the trial for April 15. *Id.* at 957–58. In a written decision listing the court's rationale, one of the factors relied on was that the defendant, "has a high salary and could therefore afford to hire another good lawyer to replace" the defense attorney. *Id.* at 958. The appellate court was not impressed with the trial court's decision and noted that,

> The salient circumstances here are that the case was not old, the indictment having come down only two and a half months before the scheduled trial date, so that if the continuance was granted the *case would be tried within five months of indictment*; the government *did not oppose* the continuance; and the judge had no scheduling conflict that would have led to a further delay had he granted the continuance. *Nothing in these circumstances indicated that the grant would pose a hardship to anyone*, and on the other side there was the defendant's interest, one of constitutional dignity, in being represented by the lawyer of her choice.

Id. at 958–59 (emphasis added). Importantly, the court found, "No one but the district judge thought it important that Santos's trial begin in April rather than the end of June or beginning of July." *Id.* at 959. Under these circumstances, the trial court abused its discretion. *Id.* at 959.

The facts in *Santos* are dramatically different from Mr. Jungers' case. When the *Santos* court evaluated the argument, it listed numerous things not present in the case. Mr. Jungers' case contains almost all the circumstances *Santos* lacked. At the time Mr. Jungers asked the trial court to continue the case an additional three months, the case had already been pending fifteen months. RP 137. If the continuance had been granted it would have extended the case to eighteen months as opposed to the five total months in *Santos*. Unlike in *Santos*, in Mr. Jungers' case the government opposed the continuance. RP 121; CP 34. Another significant difference, is unlike in *Santos*, in Mr. Jungers' case, the victim, the main witness at trial,

suffered hardship by putting off military enlistment on account of the case. RP 137.

In re Personal Restraint of Fowler is also inapposite. 197 Wn.2d 46, 479 P.3d 1164 (2021). In *Fowler*, the defendant's family hired a private attorney with a significant retainer to work on a Personal Restraint Petition (PRP) for the defendant more than two years before it was due. *Id.* at 50. The defendant spoke to the attorney on a couple occasions and the attorney falsely assured the defendant that he was working on the PRP. *Id.* As the deadline for the PRP approached, the family could not get ahold of the attorney and eventually found the phone line was disconnected. *Id.* at 50–51. It became apparent the attorney abandoned Fowler, so his family hired a new attorney. *Id.* at 51. When the family talked with the new attorney, they discovered that rather than face discipline and disbarment, the previous attorney retired. *Id.* at 51. With the PRP deadline so close, the attorney filed a "placeholder" and then filed a supplemental brief after the PRP deadline. *Id.* at 51–52. When

the new attorney asked for the case file, the original attorney never provided it, *id.* at 56, and the original attorney did not return unearned fees. *Id.* 51.

Mr. Jungers' attorneys worked on his case. On January 8, 2019, the prosecutor said defense had asked the prosecutor to follow up on additional things from the discovery and so agreed to continue the case. RP 29. Not only had Ms. Penner worked on the case, her work required the State to do follow up. RP 29.

After several more continuances, Mr. Steinmetz appeared for Mr. Jungers on July 22, 2019. RP 46–47. Mr. Steinmetz reported he started with the firm on June 17, reviewed almost all if not all of the discovery, met with Mr. Jungers and developed a plan of where to go with the case, communicated with the prosecutor about the case, received an offer, and acknowledged the prosecutor had advised him of potential consequences as well as possible amendments. RP 47.

In addition, the SSOSA evaluation is dated November 22, 2019. CP 192. The SSOSA states Mr. Steinmetz referred Mr. Jungers to Ms. Julie Crest for a SSOSA evaluation. CP 131.

In the prosecutor's affidavit, she highlights that she spoke with Mr. Steinmetz about possible resolutions on December 23, 2019 and Mr. Steinmetz advised that he would speak with his client as soon as possible. CP 38. On January 9, 2020, the prosecutor "received an email from Mr. Steinmetz advising that the defendant had signed off on the proposed resolution"; Mr. Jungers would stipulate to the admission of the 3.5 statement; and the defendant intended to enter a change of plea at the readiness hearing. CP 38. On January 10, 2020, the prosecutor received an email from Mr. Steinmetz discussing the language for the defendant's statement of plea of guilty and confirming the agreement between the parties. CP 38. On January 15, 2020, the defendant stipulated to the 3.5 statements, and the State made a record that the defendant would be entering a change of

plea at the readiness hearing scheduled for January 21, 2020. CP 38.

On January 27, 2020, in support of the substitution of counsel, Mr. Steinmetz explained that based on communications with Mr. Jungers, he had focused on how to resolve the case so that Mr. Jungers would not end up in prison. RP 124. The trial court confirmed with Mr. Steinmetz that he believed there was going to be a plea based on his communications with Mr. Jungers. RP 124. Mr. Steinmetz confirmed it was only after the 3.5 hearing on January 15, 2020, that Mr. Jungers decided he did not want to follow Mr. Steinmetz's recommendation. RP 125.

The record demonstrates that both Ms. Penner and Mr. Steinmetz worked on the case. Mr. Steinmetz worked diligently on resolving the case in a way that effected Mr. Jungers' wish to not go to prison. Mr. Steinmetz thought the case had been resolved with Mr. Jungers' blessing and let the court know through stand-in counsel at the 3.5 hearing. As such, this case is

drastically different from *Fowler*, where an attorney took a substantial retainer, had two years to file a PRP, gave false assurances he was working on the PRP, stopped communicating with the defendant's family who hired him, retired in lieu of discipline and disbarment, and did not file the PRP, did not show he had done any work on the PRP, did not provide new counsel with the defendant's file, and did not return unearned fees. Furthermore, *Fowler* addressed a question of equitable tolling of a PRP deadline, *Fowler*, 197 Wn.2d at 53–54, not whether to grant an additional three month continuance after the case had been continued for fifteen.

c. Mr. Jungers' plea agreement was knowing, intelligent and voluntary.

Despite Mr. Jungers contentions to the contrary, *see* Pet'r's Br. 17, Mr. Jungers' plea was knowing, intelligent, and voluntary. "Whether a plea is voluntary is determined by ascertaining whether the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of

the plea." *State v. Lamb*, 175 Wn.2d 121, 129, 285 P.3d 27 (2012).

Mr. Jungers cites to *United States v. Velazquez*. 855 F.3d 1021 (9th Cir. 2017). In this case the Ninth Circuit determined the trial court abused its discretion in not granting a substitution of counsel for an indigent defendant when the defendant, Velazquez,

> did everything in her power to alert the court to her belief that she was receiving inadequate assistance of counsel. She filed two motions and supporting exhibits, raised her concerns before three judges at three different hearings, and was dogged in placing her concerns on the record. Despite all of this, the district court never conducted any meaningful inquiry into Velazquez's concerns about her counsel or their relationship.

Id. at 1035.

Mr. Jungers' case is very different. Mr. Jungers conveniently brought up assertions of communication problems with Mr. Steinmetz after the court granted a two-week continuance and denied the request for a three-month continuance. *See* 139–40. He did not mention any issues with

Mr. Steinmetz's representation between June 17, 2019, when Mr. Steinmetz started representing him and January 21, 2020, when Ms. Couture attempted to substitute as counsel at readiness. Additionally, on February 3, 2020, Mr. Jungers did not indicate there were any issues with his communication with Mr. Steinmetz, even when the court closely questioned Mr. Jungers about the plea agreement. RP 149–158.

Specifically, at the change of plea hearing, Mr. Steinmetz told the court, "Mr. Jungers and I continued our conversation," RP 147, indicating that Mr. Jungers and Mr. Steinmetz were effectively communicating. The court made sure that Mr. Jungers understood that in requesting the SSOSA, Mr. Jungers would have to voluntarily admit in court to all the elements of the crime. RP 149. The court also made sure that Mr. Jungers understood he had the right to go to trial and that by entering the plea, Mr. Jungers would be giving up numerous rights. RP 152–53. Additionally, in response to the trial court asking Mr. Jungers whether, "anybody pressured you, coerced you or

somehow . . . unduly pressured you . . . to entering . . . the plea," Mr. Jungers replied, "No, Your Honor." RP 156.

The court asked Mr. Jungers numerous questions to ensure that the plea was entered knowingly, intelligently, and voluntarily. Additionally, Mr. Jungers never raised any issues with being able to communicate with Mr. Steinmetz during the plea hearing. RP 146–60. The record supports Mr. Jungers entered the plea agreement knowingly, intelligently, and voluntarily.

This Court should deny review under RAP 13.4(b)(1) & (3) because the trial court properly exercised its discretion to deny Mr. Jungers' eleventh hour substitution.

B. THE TRIAL COURT HAD SUFFICIENT INFORMATION TO DETERMINE WITHOUT HOLDING AN IN-CAMERA HEARING THE NATURE OF MR. JUNGERS' CLAIMED CONFLICT WITH COUNSEL.

A three-factor test is utilized to determine whether irreconcilable conflict requires substitution of counsel: "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3)

the timeliness of the motion." *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). Substitution motions cannot properly be resolved unless the trial court investigates a defendant's reasons for wanting a different lawyer. *Velazquez*, 855 F.3d at 1034 (citations omitted). "Failure to conduct an inquiry is not necessarily an abuse of discretion if the trial court has sufficient information to resolve the motion." *Id.*

Here, as the Court of Appeals found, the trial court could determine the root of Mr. Jungers' stated dissatisfaction without an in-camera investigation. Noting this was the first time Mr. Jungers indicated dissatisfaction with Mr. Steinmetz and that just days earlier Mr. Jungers listened without comment as counsel told the court the case would resolve at the next hearing, RP 133–34, the trial court reasonably concluded there had been "decent communication, if not good communication, up through the 15th of this month." RP 134. Mr. Jungers then volunteered the conflict with Mr. Steinmetz hinged around his uncertainty about what he would be asked to admit when he

changed his plea. RP 141. He was frustrated he had to communicate by email and improbably claimed to be unaware of what he supposedly did. RP 141. Only after the court told Mr. Jungers to discuss those issues with his attorney did Mr. Jungers complain of poor communication and lack of trust that Mr. Steinmetz would be prepared for trial in two weeks. RP 140–41.

Although case law favors judicial inquiry into details of counsel-client conflicts, formal investigation is not required when a defendant's recitation of the problem and the judge's observations provide sufficient basis for reaching an informed decision. *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002). Here, the judge determined Mr. Jungers' perception of "conflict" concerned anxiety. *See* RP 134. Anxiety about the details of his impending plea change that were placable by discussion with counsel.

As the Court of Appeals noted, none of the information Mr. Jungers, Mr. Steinmetz, or Ms. Couture provided gave the

prosecution extra leverage. *Jungers*, slip op. at 31–32. Mr. Jungers claims:

> "[W]ith in camera proceedings, the prosecutor would not have known (1) about Steinmetz's failure to conduct an independent defense investigation, (2) about Steinmetz's failure to meet with his client and explain the case to him, and (3) about the depths of Jungers' lack of trust in his lawyer and the full extent of their communication breakdown."

Pet'r's Br. 22.

Mr. Jungers' assertion that Mr. Steinmetz's failed "to conduct an independent defense investigation," Pet'r's Br. 22, fails as Mr. Steinmetz referred Mr. Jungers for a SSOSA evaluation. CP 131. Additionally, Mr. Jungers concedes that the prosecutor already knew that Mr. Steinmetz had not yet interviewed the witnesses and fails to explain what independent defense investigation Mr. Steinmetz failed to do. Pet'r's Br. 22.

Mr. Jungers' claim that Mr. Steinmetz failed to meet with him and explain the case to him resulting in a lack of trust and communication breakdown is not supported by the record. The

record reflects that Mr. Steinmetz physically met with Mr. Jungers at least twice, RP 124, 104, and Mr. Jungers was able to communicate with Mr. Steinmetz via phone and email. RP 123.

A SSOSA evaluation was done based on a referral from Mr. Steinmetz. CP 131. The evaluation dates are listed as July 31, 2019 and August 7, 2019. CP 131. A polygraph was conducted on October 10, 2019. CP 154. The evaluation report is dated November 22, 2019. CP 131. The SSOSA was an integral part of the defense's strategy to affect Mr. Jungers' wish to remain out of prison. It is clear the impetus for Mr. Steinmetz not moving the case forward and requesting continuances prior to the end of November was to allow time to receive the evaluation and then to negotiate a plea based on the evaluation. *See* RP 124. On November 25, 2019, three days after the evaluation report is dated, Mr. Steinmetz informed the court that they were at a point where they could "discuss a productive resolution." RP 101.

At the 3.5 hearing, when asked if he reviewed the 3.5 stipulation with his attorney, Mr. Jungers replied that he understood everything. RP 109. In addition, the prosecutor told the court that in communicating with, Mr. Steinmetz, he believed that there would be a change of plea in a week. RP 109. Mr. Jungers, who was present, did not correct this nor indicate any issues. RP 108–09.

The record shows that Mr. Steinmetz and Mr. Jungers communicated and developed a plan on approaching the case. RP 47. Additionally, a reasonable inference to Mr. Jungers declaration that he understood the 3.5 stipulation was that his understanding was a result of Mr. Steinmetz explaining it to him. Mr. Steinmetz's comments to the court on January 21, 2020, support this: "[O]n Wednesday . . . [the prosecutor] and I worked out a stipulation to the 3.5 issues, my client signed off on that and I had Mr. Chadwick appear for me just to enter the stipulation and advise the Court that we expected to resolve today." RP 114–15.

Furthermore, on January 27, 2020, Mr. Steinmetz confirmed to the court that he discussed the plea with Mr. Jungers and Mr. Jungers was willing to take the plea. RP 124.

Mr. Jungers' improbable allegations that Mr. Steinmetz failed to provide him the necessary documentation to allow him to enter a statement of plea reflects Mr. Jungers' ongoing struggle to accept responsibility for his pedophilic actions. In the recorded phone conversation between Mr. Jungers and the victim, H.N., Mr. Jungers attempted to lay the blame on H.N. for his sexual actions with a seven or eight year old H.N. For example, one of the incidents Mr. Jungers recounted over the phone was that H.N. wanted Mr. Jungers to go to the bedroom and then told Mr. Jungers to pretend like she is his wife. CP 10. Mr. Jungers then said H.N. "grabbed his hand and put it in between her legs." CP 10. Mr. Jungers told H.N. that he was thinking "where the hell is my hand." CP 10. Mr. Jungers asserted that he then "moved his hand to the left and to the right, to find out where his hand was." CP 10. After admitting

to a number of sexual contacts, alluding to having sex with H.N., and alleging that all of the contacts were at H.N.'s initiation, Mr. Jungers blamed the contacts on H.N.'s curiosity. CP 10–11. Mr. Jungers told H.N. that young people don't look at old people the same way . . . . [Y]oung people who are seven or eight, look past that . . . ." CP 11. Mr. Jungers told H.N. that it was a childhood curiosity thing and that she needed to get over it. CP 12. Mr. Jungers expressed multiple times that he was "scared shitless" to go to jail or prison. CP 12.

In the SSOSA evaluation, Mr. Jungers portrayed himself as a victim of H.N., who he maligned as a sexually aggressive child somewhere around seven to ten. CP 143, 156, 157. Mr. Jungers also agreed with statements that support his justifications for sexually abusing children. CP 144–45.

The statement of plea forced Mr. Jungers to squarely face and admit his pedophilic actions. CP 56–57. Mr. Jungers feared doing this because he feared going to prison. CP 12, 156. The record supports Mr. Jungers desperately trying to blame a seven

to ten year old child for sexual aggression in order to rationalize his actions and remain out of prison.

Additionally, Mr. Jungers' contention that the State threatened to increase the charges because of the alleged new found leverage is baseless. *See* Pet'r's Br. 22. The State had expressed its intention to amend the charges including adding enhancements on multiple prior occasions. At the July 22, 2019 hearing, Mr. Steinmetz stated, "[The Prosecutor] has given me an offer and advised me of other potential consequences or other potential amendments and I advised her this morning of where I want to go with this case." RP 47. The amendments included "special allegations for the victim being under 15 years of age and predatory offender." CP 35. At the November 13, 2019 omnibus hearing, the omnibus order shows that the State intended to move to amend the Information. CP 20.

Mr. Jungers' assertions fail. The State had let Mr. Jungers and his attorney know all along there were potential amendments that they were considering. Additionally, the

prosecutor agreed to uphold the original plea agreement that Mr. Jungers originally had agreed to enter. RP 148. Nothing changed regarding the State's position based on the purported additional leverage.

The court had enough information from its inquiry to make an informed decision regarding substituting counsel without utilizing an in-camera hearing. None of the information disclosed gave the State any additional leverage or revealed any information the State did not already have access to or that could not be reasonably inferred. As such, there is no constitutional issue under RAP 13.4(b)(3), and the issue does not present an issue of public importance the Washington State Supreme Court needs to address under RAP 13.4(b)(4).

C. THIS COURT SHOULD DECLINE REVIEW OF MR. JUNGERS' CONSTITUTIONAL CHALLENGE TO THE "GREAT WEIGHT" PROVISION OF RCW 9.94A.670(4) BECAUSE HE DOES NOT DEMONSTRATE MANIFEST ERROR.

Mr. Jungers did not object at sentencing or any other stage of the proceedings to the "great weight" provision of

RCW 9.94A.670(4). RP (Sentencing) 52–68. Claims of error not raised by timely and specific objection below are generally rejected for appellate review unless the error is "a manifest error affecting a constitutional right." RAP 2.5(a). Here, the claimed error was far from obvious. Rather it is an uncommon constitutional challenge to a specific provision of the Sentencing Reform Act. As such, this Court should deny review.

The Court of Appeals did an excellent job in addressing the substance of Mr. Jungers' contention walking through the legislative history, *Jungers*, slip op. 33–36, separation of powers, *id.* at 36–37, and protection against cruel and unusual punishment. *Id.* at 37–39. The Court of Appeals astutely pointed out that Mr. Jungers could cite "no authority for the proposition that the criteria for sentencing alternative can render an otherwise constitutional sentence "cruel" punishment. *Id.* at 38. As such, this Court should deny review under RAP 13.4(b)(3)–(4).

D. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED MR. JUNGERS' REQUEST FOR A SSOSA.

"The grant of a SSOSA sentence is entirely at a trial court's discretion, so long as the trial court does not abuse its discretion by denying a SSOSA on an impermissible basis." *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285, 290 (2011) (citing *State v. Osman,* 157 Wash.2d 474, 482 n. 8, 139 P.3d 334 (2006)).

Mr. Jungers concedes the trial court examined the key factors identified in RCW 9.94A.670(4) and does not argue the court abused its discretion through an incorrect analysis of statutory SSOSA guidelines. Pet'r's Br. 28–29. Neither does he argue sentencing him to prison is a constitutional violation. *Id.* Instead, he asserts it is a "manifestly unreasonable" abuse of discretion "to send a 77-year old physically infirm person" to prison. *Id.* at 29. Further, he generously describes Mr. Jungers as amenable to treatment, an optimistic characterization of "minimally amenable to treatment," Ms. Crest's final

conclusion. RP (Sentencing) 31.

There is some evidence in the record of Mr. Jungers medical needs. CP 71. Shortly after his arrest, the Grant County Jail nurse wrote "Although his needs are extensive, we have been able to find accommodations for Inmate Jungers." CP 71. Mr. Jungers does not challenge her conclusion here.

The trial judge recognized Mr. Jungers' age and health when he built flexibility into the low end of Mr. Jungers' sentence to accommodate his age and health issues. RP (Sentencing) 93.

In *Colvin v. Inslee*, the Washington Supreme Court addressed an Eighth Amendment constitutional challenge to inmate confinement during the COVID-19 pandemic; the decision reflects the Court's focus on the constitutionally-required showing of a substantial risk of harm under that analysis. 195 Wn.2d 879, 900, 467 P.3d 953 (2020). The Court found a substantial risk of harm, with nothing more, was insufficient to establish a violation of Eighth Amendment

rights. *Id.* The petitioners were unable to show the requisite subjective recklessness or deliberate indifference to the risk of harm. *Id.* at 901.

Although the Eighth Amendment subjective recklessness-deliberate indifference standard differs from the standard for abuse of judicial discretion, *Colvin* clarifies the act of sending someone to prison during the COVID-19 pandemic, absent a showing of subjective recklessness or deliberate indifference to the risks, does not offend Washington law. *Id.* That DOC has released low-level offenders into the community to make room for violent offenders such as Mr. Jungers demonstrates reasonable incarceration priorities and provides evidence of the lengths to which DOC is going to protect a vulnerable population. *Colvin*, 195 Wn.2d at 901. Further steps taken by DOC to mitigate the risk posed by COVID-19 are extensively catalogued in *Matter of Williams.* 198 Wn.2d 342, 349, 496 P.3d 289 (2021).

In *Williams*, the defendant outlined specific issues with DOC's attempts to accommodate the defendant's disabilities. *Id.* at 351–52. The Washington State Supreme Court then found that DOC's deprivation of basic hygiene was not necessary to accomplish a legitimate penological interest. *Id.* at 369–70.

Unlike in *Williams*, here, the record is devoid of any indication that DOC cannot reasonably accommodate Mr. Jungers' medical issues.

This Court should find the trial court properly exercised its discretion when it declined to order a SSOSA disposition despite Mr. Jungers age and vulnerability, having found the community and the victim would not benefit from such a disposition in Mr. Jungers' case. This Court should find Mr. Jungers' contentions to not warrant review under RAP 13.4(b)(1)–(4).

IV. CONCLUSION

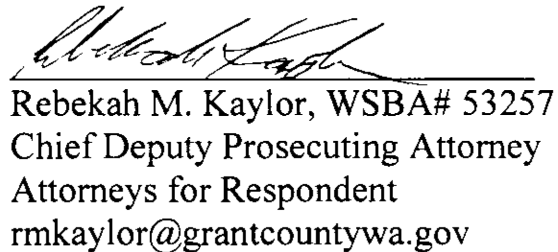
This Court should deny Mr. Jungers' Petition for Review as none of the issues presented warrant review under RAP 13.4(b)(1)–(4).

In accordance with the grant of the motion to file an over length brief up to 6,000 words, this document contains 5,952 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 1st of February, 2022.

Respectfully submitted,

KEVIN MCCRAE
Grant County Prosecuting Attorney



Rebekah M. Kaylor, WSBA# 53257
Chief Deputy Prosecuting Attorney
Attorneys for Respondent
rmkaylor@grantcountywa.gov

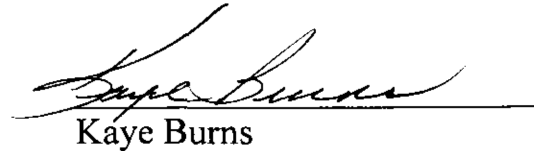
CERTIFICATE OF SERVICE

On this day I served a copy of the Shortened Answer to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Neil Martin Fox
Law Office of Neil Fox, PLLC
nf@neilfoxlaw.com

Robert E. Schiffner
doublebogies@hotmail.com

Dated: February / , 2022.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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Transmittal Information

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Appellate Court Case Title:	State of Washington v. Craig Russell Jungers
Superior Court Case Number:	18-1-00668-9

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